

A **KUMPULAN DARUL EHSAN BHD v.  
MASTIKA LAGENDA SDN BHD**

FEDERAL COURT, PUTRAJAYA  
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)  
RICHARD MALANJUM CJ (SABAH & SARAWAK)

B AHMAD MAAROP FCJ  
ZAHARAH IBRAHIM FCJ  
BALIA YUSOF WAHI FCJ  
[CIVIL APPEAL NO: 02(f)-88-12-2015 (B)]  
11 JULY 2017

C **CONTRACT:** *Construction – Shares sale agreement – Termination – Application for refund of purchase price – Whether action or application time-barred – Option to terminate – Whether to be exercised within reasonable time – Whether issues of laches and reasonableness of time arose – Whether plaintiff entitled to refund*

D **LIMITATION:** *Contract – Shares sale agreement – Termination – Refund of purchase price – Whether action of application time-barred – Issues of laches and reasonableness of time – Whether could be relied upon as defence – Whether plaintiff entitled to refund*

E Tenaga Nasional Berhad ('TNB') and the appellant ('the defendant') were shareholders in Sepang Power Sdn Bhd ('SPSB') who were awarded a project to develop a power plant in Kuala Langat, Selangor. By an agreement dated 21 May 2002 ('TNB-MLSB-SSA'), TNB undertook to sell its shares in SPSB to the respondent ('the plaintiff') and subsequent thereto, by a shares sale agreement dated 9 December 2002 ('SSA'), the defendant also agreed to sell its holding in SPSB to the plaintiff. The purchase price of RM 8.5 million for the shares sale in SSA had been paid by the plaintiff. Also the SSA, by its terms, had specified the manner in which the agreement was to be completed and was subject to the fulfilment of certain conditions and conditions precedent. As events transpired, on 23 December 2004, TNB terminated the TNB-MLSB-SSA ('TNB's termination'), and following that, the plaintiff sought to terminate the SSA and demanded, by letter dated 16 December 2008, for the refund of the RM8.5 million from the defendant. The defendant did not accede and on 12 May 2011 the plaintiff filed the present suit in the High Court.

H The High Court Judge, upon appraisal of the evidence, dismissed the plaintiff's claim. It was the view of the judge that although the action was not statute-barred, the plaintiff, in terminating the SSA some four years after the TNB's termination, was guilty of laches and unreasonable delay. The plaintiff appealed whereupon the Court of Appeal, allowing the appeal, ruled that while the judge was correct on the limitation issue, he was wrong in

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invoking equity in favour of the defendant. In the opinion of the justices of appeal, equity had no role to play as the relationship of the parties was governed by the terms of the SSA. Dissatisfied, the defendant appealed to the Federal Court and essentially argued that notwithstanding that the SSA gave the plaintiff an option to exercise its right to terminate upon the occurrence of an agreed event, the option ought to have been exercised within a reasonable time. Three questions of law, in any case, were entertained by the apex court, including 'whether, in the case of an option which is exercisable upon the happening of a specified event ('trigger event'), time for limitation would only start to run upon the option being exercised and not from the occurrence of the trigger event.' ('question 1').

**Held (dismissing appeal)**

**Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:**

- (1) Since the plaintiff and the defendant had clearly agreed to the terms in the SSA, they should be bound by them. And since 'no failure or delay by any party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof', there was no basis to call upon equity in aid to the case of the defendant. As correctly held by the Court of Appeal, laches and unreasonable delay did not arise in this case. (para 24)
- (2) The High Court and the Court of Appeal were correct in finding that limitation had not set in. Indeed, the period of limitation should start to run upon the exercise of the option by the plaintiff and followed by the failure of the defendant to comply with the demand for refund of the purchase price, and not from the time of TNB's termination. This court's answer to question 1 was therefore in the affirmative. (para 24)
- (3) Having answered question 1 in the affirmative, it was clear that the limitation period had not set in against the plaintiff when the action was commenced. Since the action was taken within the limitation period, the issues of reasonableness in the exercise of the option or the reliance upon the defence of laches and acquiescence could not be relied upon by the defendant. As such, there was no need to answer questions 2 and 3. Further, this court agreed with the Court of Appeal that s. 32 of the Limitation Act 1953 did not apply to the instant case. (para 25)

***Bahasa Malaysia Headnotes***

Tenaga Nasional Berhad ('TNB') dan perayu ('defendan') adalah pemegang saham dalam Sepang Power Sdn Bhd ('SPSB') yang diawardkan projek untuk membina satu jana kuasa di Kuala Langat, Selangor. Melalui perjanjian bertarikh 21 Mei 2002 ('TNB-MLSB-SSA'), TNB berjanji untuk menjual sahamnya dalam SPSB kepada responden ('plaintif'), dan kemudiannya, melalui perjanjian bertarikh 9 Disember 2002 ('SSA'), defendan juga bersetuju untuk menjual pegangannya dalam SPSB kepada plaintif. Harga

- A belian bagi jualan saham sebanyak RM8.5 juta telah dibayar oleh plaintif. Juga cara bagaimana perjanjian harus disempurna telah ditetapkan oleh terma-terma SSA, dan bahawa pelaksanaan SSA tertakluk pada beberapa syarat dan syarat duluan. Rangkaian peristiwa bagaimanapun menunjukkan bahawa pada 23 Disember 2004 TNB-MLSB-SSA telah ditamatkan oleh
- B TNB ('penamatan TNB'), dan berikutan itu, plaintif juga turut cuba menamatkan SSA, serta menuntut, melalui surat bertarikh 16 Disember 2008, supaya defendan membayar balik harga belian sebanyak RM8.5 juta. Tuntutan ini tidak dipenuhi oleh defendan dan pada 12 Mei 2011, plaintif memfailkan tindakan semasa di Mahkamah Tinggi.
- C Hakim Mahkamah Tinggi, setelah mengamati keterangan, menolak tuntutan plaintif. Adalah menjadi pandangan beliau bahawa, walaupun tindakan tidak dihalang oleh had masa, plaintif bersalah kerana berlengah dan bersikap acuh tak acuh apabila hanya menamatkan SSA selepas empat tahun penamatan TNB. Plaintif merayu dan berikutnya Mahkamah Rayuan membenarkan
- D rayuan dan merumuskan bahawa, sementara Hakim Mahkamah Tinggi betul berkenaan isu had masa, beliau terkhilaf apabila menggunakan ekuiti untuk memihak pada defendan. Menurut hakim-hakim rayuan, ekuiti tiada peranan untuk dimainkan kerana hubungan pihak-pihak diselia oleh terma-terma SSA. Tidak berpuas hati, defendan merayu ke Mahkamah Persekutuan dan
- E menghujahkan secara pentingnya bahawa walaupun SSA memberi plaintif opsyen untuk melaksanakan haknya untuk menamatkan perjanjian apabila berlakunya peristiwa yang dipersetujui, opsyen tersebut perlu dilaksanakan dalam tempoh munasabah. Apapun, tiga soalan undang-undang juga telah dibenarkan oleh mahkamah tertinggi, termasuk sama ada, dalam kes di mana
- F opsyen boleh dilaksanakan bila terjadinya suatu peristiwa yang ditetapkan ('peristiwa pencetus'), masa bagi had masa hanya akan bermula sewaktu opsyen tersebut dilaksanakan dan bukannya dari masa berlakunya peristiwa pencetus ('soalan 1').

**Diputuskan (menolak rayuan)**

- G **Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:**

- (1) Oleh kerana plaintif dan defendan dengan jelas telah menerima terma-terma SSA maka mereka harus terikat dengannya. Dan oleh kerana 'tiada kegagalan atau kelengahan oleh mana-mana pihak dalam melaksanakan mana-mana hak yang diberikan di sini atau yang diberikan oleh undang-undang boleh menjadi suatu waiver', maka tiada asas untuk menggunakan ekuiti kepada kes defendan. Seperti yang diputuskan dengan betulnya oleh Mahkamah Rayuan, kelengahan dan kelewatan tidak munasabah tidak berbangkit dalam kes ini.

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- (2) Mahkamah Tinggi dan Mahkamah Rayuan betul dalam memutuskan bahawa had masa masih belum berbangkit. Malah, tempoh had masa sepatutnya bermula ketika opsyen dilaksanakan oleh plaintif dan diikuti dengan kegagalan defendan untuk memenuhi tuntutan bayaran balik harga belian, dan bukannya dari tarikh penamatan TNB. Oleh itu, jawapan mahkamah ini terhadap soalan 1 adalah dalam bentuk afirmatif. A  
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- (3) Dengan soalan 1 dijawab secara afirmatif, jelaslah bahawa had masa masih belum terpakai pada plaintif sewaktu tindakan dimulakan. Oleh kerana tindakan diambil dalam tempoh had masa, maka isu kemunasabahan dalam melaksanakan opsyen atau kebergantungan kepada pembelaan kelengahan atau keakuran tidak boleh dibangkitkan oleh defendan. Oleh demikian, tiada keperluan untuk menjawab soalan 2 dan soalan 3. Selain itu, mahkamah ini juga bersetuju dengan Mahkamah Rayuan bahawa s. 32 Akta Had Masa 1953 tidak terpakai pada kes semasa. C

**Case(s) referred to:**

*The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717 FC (*refd*) D

**Legislation referred to:**

Companies Act 1965, s. 162(1)

Limitation Act 1953, s. 32

*For the appellant - David Thomas Mathews, S Janagasutha, Tina Ann Francis, Sri Lachaman Kumar; M/s Mathews Hun Lachimanan* E

*For the respondent - Karen Lee & Sean Tan; M/s Wong Kian Kheong*

*[Editor's note: For the Court of Appeal judgment, please see Mastika Lagenda Sdn Bhd v. Kumpulan Darul Ehsan Berhad [2015] 1 LNS 1469 (affirmed).]* F

*Reported by Wan Sharif Ahmad*

**JUDGMENT**

**Richard Malanjum CJ (Sabah & Sarawak):** G

**Preliminary**

[1] In this judgment unless otherwise stated, the parties are referred to as they were in the High Court.

[2] On 1 December 2015 this court granted the defendant leave to appeal on the following three questions: H

- (i) Whether, in the case of an OPTION which is exercisable upon the happening of a specified event (Trigger Event), time for limitation would only start to run upon the option being exercised and not from the occurrence of the Trigger Event; I

- A (ii) Where no time period is specified for the exercise of an OPTION, whether non-waiver/waiver clauses would serve to preclude the courts from having the jurisdiction and power to imply that the OPTION is to be exercised within a reasonable time after the happening of the Trigger Event; and
- B (iii) Whether the presence of non waiver/waiver clauses in an OPTION contract would preclude reliance on equitable defences such as laches and acquiescence altogether notwithstanding that s. 32 of the Limitation Act 1953 expressly preserves its applicability?

C **Background Facts**

[3] The plaintiff is a private limited company incorporated in Malaysia whose registered address is at Level 24, Wisma Genting, 28 Jalan Sultan Ismail, 50250 Kuala Lumpur.

D [4] The defendant is a public limited company incorporated in Malaysia having its registered address at Level 16, Plaza Perangsang, Persiaran Perbandaran Shah Alam, 40000 Selangor Darul Ehsan.

E [5] By a letter of award dated 9 March 2001 Sepang Power Sdn Bhd (SPSB), was awarded by the Economic Planning Unit an approval to develop and operate a 710MW gas-fired combined cycle power plant in the District of Kuala Langat, Selangor Darul Ehsan (the power plant project).

F [6] By an agreement dated 21 May 2002 (TNB-MLSB SSA) Tenaga Nasional Berhad (TNB) and the plaintiff, subject to certain fulfilment of relevant conditions precedent, agreed on the sale of TNB's 400,000 shares, equivalent to 40% of the issued shares in SPSB, to the plaintiff.

[7] Subsequently the plaintiff and the defendant entered into a share sale agreement dated 9 December 2002 (the SSA) in which the defendant agreed to sell its entire stake in SPSB which was equivalent to 300,000 shares or 30% of the issued shares in SPSB (the sale shares) to the plaintiff.

G [8] The agreed purchase price of the sale shares was RM8,500,000 (the purchase price). The purchase price was paid to the defendant on 9 December 2002.

H [9] Clause 8 of the SSA specified the manner in which the SSA was to be completed by the parties. The SSA was subject to fulfilment of conditions precedent (CP) in cl. 5 and special conditions in cl. 9 of the SSA.

[10] For ease of reference, relevant parts of cls. 9 and 19 are reproduced in *verbatim*:

I 9.8 Notwithstanding the Completion of the sale and purchase of the Sale Shares pursuant to this Agreement, in the event that the TNB-MLSB SPA is not completed, MLSB may elect to terminate this Agreement and the Parties agree to proceed in accordance with Clause 9.9.

- 9.9 In the event of the situations in Clause 9.3, 9.5(b) or  
Clause 9.8 above arising then, mindful of Clause 13, the Parties agree to  
proceed as follows:
- (a) ...
- (b) if Completion has taken place and remittance of the Purchase Price  
made, either party may opt to terminate this Agreement and MLSB  
or its nominee company, as the case may be, shall return the Sale  
Shares to KDEB and KDEB shall refund the Purchase Price to  
MLSB free of interest in which case the Party opting to terminate  
this Agreement is understood to have opted to not proceed with  
this Agreement.
- 19.9 Waiver
- No failure or delay by any Party in exercising any rights hereunder or  
conferred by law shall operate as a waiver thereof nor shall any single or  
partial exercise of any right preclude any further exercise thereof or the  
exercise of any other right. The rights and remedies provided in this  
Agreement are cumulative and not exclusive of any rights or remedies  
otherwise provided by law or in equity.
- 19.11 Non-Waiver
- No exercise or failure or delay in exercise of any rights, power or remedy  
vested in either Party under or pursuant to this Agreement shall constitute  
a waiver by such Party of that or any right, power or remedy.
- [11] By way of a letter dated 23 December 2004 TNB terminated the TNB-  
MLSB SSA (TNB's termination).
- [12] Consequently, the plaintiff, through its solicitors informed the  
defendant of TNB's termination and demanded for the refund of the purchase  
price from the defendant *vide* several letters dated 16 December 2008,  
28 April 2009 and 22 February 2011 respectively.
- [13] The defendant to date has not refunded the purchase price to the  
plaintiff and thus in breach of the SSA.
- [14] The plaintiff therefore filed an action for recovery of the purchase  
price, interest and costs at the High Court in Malaya at Shah Alam.
- [15] In its defence, the defendant pleaded that the plaintiff's action for  
recovery of the purchase price was barred by limitation and that there was  
unreasonable delay in filing the action. The defendant further averred that the  
plaintiff's cause of action accrued from the date of TNB's termination. Since  
the action of the plaintiff was filed on 12 May 2011 it was therefore statute  
barred.
- [16] The defendant further pleaded an implied term in that the plaintiff  
ought to have exercised its right to terminate the SSA within reasonable  
period of time following TNB's termination.

A [17] The defendant also counterclaimed for specific performance in that the plaintiff ought to register and/or file the relevant share transfer instruments necessary to effect the transfer of the sale shares to the plaintiff and to remove the defendant as the owner of those sale shares pursuant to s. 162(1) of the Companies Act 1965.

B **Before The High Court**

[18] The learned trial judge dismissed the plaintiff's action and allowed the defendant's counterclaim with costs of RM50,000.

C [19] Basically the learned trial judge dismissed the action of the plaintiff on the ground that laches and unreasonable delay in terminating the SSA which was four years after TNB's termination. The defendant was therefore unduly prejudiced. However, the learned trial judge opined that time should begin to run when the defendant failed to refund the purchase price after the demand was made on 16 December 2008. In other words, the learned trial judge ruled that the action of the plaintiff was not statute-barred.

D **Before The Court Of Appeal**

E [20] The plaintiff appealed to the Court of Appeal. The appeal was allowed. While the Court of Appeal agreed with the learned trial judge that the action was not statute-barred, it did not agree with the learned trial judge that equity should be invoked in considering the relationship of the parties since it was governed by the terms in the SSA. Otherwise the court would be rewriting the SSA. After all, it was agreed in the SSA that any delay in exercising the rights therein should not constitute a waiver and s. 32 of the Limitation Act did not apply.

F **Before This Court**

*Question 1*

G [21] Learned counsel for the defendant submitted that in a given written contract, notwithstanding the option to exercise by one party upon the occurrence of an agreed event, such option must be exercised within a reasonable time and for the purpose of computing the limitation period it should be from the time when the option should have been exercised. To hold otherwise would create uncertainty in the contract and unjust result. It could mean that the party having the right to exercise the option could do so at any time and upon exercise would have another six years before the expiry of the limitation period.

H [22] In response, learned counsel for the plaintiff submitted that limitation period should run from the time the defendant failed to refund the purchase price after the demand was made and not from the time of TNB's termination since at that time the option was yet to be exercised. Further, it was contended that limitation period should not be an issue before this court since the defendant did not appeal on that issue before the Court of Appeal.

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[23] In considering question 1 it must be taken into account what the parties agreed to in the SSA. In this case there were two crucial matters agreed upon, namely, the option right and the waiver provision. As such those terms must be considered in the light of the legal principles, *to wit*, that the sanctity of a contract must be preserved and that it is not the function of the court to rewrite the agreed terms in a contract. (See: *The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717; [2014] 6 MLJ 153).

[24] Accordingly, since the plaintiff and the defendant had clearly agreed to the terms in the SSA such as cls. 9.8, 9.9, 19.9 and 19.11 they should be bound by them. And since ‘no failure or delay by any party in exercising any rights hereunder or conferred by law shall operate as a waiver thereof’ we find no basis to call upon equity in aid to the case of the defendant. As such, we agree with the Court of Appeal that in this case laches and unreasonable delay do not arise. But on the issue of limitation, we agree with the findings of the High Court and the Court of Appeal that in this case limitation had not set in. Indeed, the period of limitation should start to run upon the exercise of the option by the plaintiff and followed by the failure of the defendant to comply with the demand for refund of the purchase price and not from the time of TNB’s termination. Our answer to question 1 is therefore in the affirmative.

*Questions 2 And 3*

[25] Having answered question 1 in the affirmative, it is clear that the limitation period had not set in against the plaintiff when the action was commenced. Since the action was taken within the limitation period the issues of reasonableness in the exercise of the option or the reliance upon the defences of laches and acquiescence could not be relied upon by the defendant. As such we need not answer questions 2 and 3. Further we agree with the reasons given by the Court of Appeal on the inapplicability of s. 32 of the Limitation Act 1953 in this case.

### Conclusion

[26] For the above reasons this appeal is dismissed with costs. Learned members of the panel have read this judgment in draft and have expressed their concurrence.